UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of:

TRI-STATE WHOLESALE BUILDING SUPPLIES, INC.	:	
and	:	**Case 9-CA-125950**
GARY LARKIN, AN INDIVIDUAL	:	

TRI-STATE WHOLESALE BUILDING SUPPLIES, INC.'S ANSWERING BRIEF TO THE GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

The Respondent in this matter, Tri-State Wholesale Building Supplies, Inc., (herein, "Tri-State" or the "Company") through its attorneys Edward S. Dorsey and Wood & Lamping and Mark Fitch and Fitch & Spegal, hereby files its Answering Brief to the General Counsel's Exceptions to the Administrative Law Judge's Decision.

The General Counsel's Exceptions are without merit.

The General Counsel continues to argue that Aubrey Chase made an unconditional offer to return to work on January 9 and the Company refused to reinstate him. Not only was this contention rejected by the Administrative Law Judge, it strains credulity.

First, it is clear that Chase made only a conditional offer to return to work on January 9. Thus, substantial record evidence shows Chase arrived at work on January 9 willing

to work if, and only if, he first met with Caldon. Operations Manager Mickle testified that Chase showed up for work on January 9, but told Mickle that he would not work until he met with Caldon. (TR. 155). Mickle told Chase that if Chase went to work, he could meet with Caldon at 2:30 PM, but if he did not work, he had to punch out. (TR. 114, 155). Chase punched out and did not attend the 2:30 PM meeting with Caldon. (TR. 156). Mickle's testimony – that Chase refused to work until he first met with Caldon -- is consistent with what the other employees who walked out had discussed and decided to do. It was those employees who requested the meeting with Caldon, not the other way around. (TR. 85, 151). The employees wanted the meeting so that they could discuss with Caldon the New Year's Day pay issue. Chase's testimony relied upon by the General Counsel is inconsistent with this uncontroverted fact. Mickle's testimony is therefore far more plausible. The Administrative Law Judge implicitly credited Mickle's testimony.

Second, although Chase's testimony differed from Mickle's, Chase contradicted himself on a critical detail. Chase initially testified that he tried to return to work on Thursday, January 9, but that Mickle told him that he could not return to work until he first met with Caldon. But Chase then admitted on cross examination that *he* was the one that wanted a meeting with Caldon on Thursday morning, and that he thought a meeting with Caldon had been scheduled (TR. 56, 57). Chase's testimony on cross was consistent with the meeting that Utz had tried to arrange (TR. 150 – 151) and with Mickle's testimony. Chase's testimony that Mickle insisted that Chase meet with Caldon before he could return to work therefore conflicts with Chase's own testimony on cross.[1] This alone is ample reason to reject the General Counsel's exception.

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[1] Overall, Chase's testimony was remarkable for its inconsistency. In addition to the inconsistency noted above, Chase at one point testified that Caldon told him on January 13 that he was fired, and then testified a few minutes later that on that day Caldon told him he was not fired. (Tr. 52, 60-61.) And despite Chase's testimony claiming that he was ready and willing to work unconditionally on January 9 but was nonetheless told to punch out and go home, he did not think he had been terminated. (Tr. 60-61).

Third, it is undisputed that Daniel Showes, who also walked out on January 8 with the others, unconditionally returned to work January 9 without incident and without first having to meet with Caldon. As the Administrative Law Judge reasonably found, there is no plausible reason why Showes would have been treated differently than Chase.

The General Counsel objects to the Administrative Law Judge's finding, arguing that one of the options the Company considered for responding to the strike was to terminate all of the strikers and then rehire only some of them. The General Counsel argues that allowing Showes but not Chase to return to work was part of this plan. There are problems with the General Counsel's speculation.

Thus, there is no evidence whatsoever that Chase was a striker that the Company somehow "planned" not to bring back. Indeed, there is no evidence that the Company ever even made a list of those it did not want to take back. Moreover, there is no evidence that Chase was even likely to have been a striker that the Company would not want back. There was no evidence that Chase was in any way a leader of the walk out. Indeed, taken as a whole, the record shows that Chase was a follower, not a leader, in the walk out. For example, he was so out of the loop that he showed up for a morning meeting with Caldon on January 9, while none of the other strikers did so (except Showes who was willing to return to work without first meeting with Caldon). The General Counsel's argument is simply speculation, which does not satisfy his burden of proof.

The General Counsel's argument also theorizes that the Company implemented on January 9 one option it had under consideration, but did so only partially. Thus, the General Counsel suggests that the Company decided the morning of January 9 to terminate all of the strikers and then select a few to reinstate. And yet it is clear that the Company did not terminate

the other strikers on January 9. If the Company had in fact decided on January 9 to terminate all of the strikers, why did it not do so? The General Counsel offers no explanation. The fact is that, as discussed elsewhere, the record shows the Company deliberated several options for responding to the strike, and did not make a decision as to which option to implement until the afternoon of January 10. That decision was to hire permanent replacements for the strikers. Clearly, the General Counsel's exception on this issue is without merit.

The General Counsel also excepts to the Administrative Law Judge's proposed remedy. This exception is without merit. As shown in the Company's Exceptions and its Reply brief, the Administrative Law Judge's decision should be vacated in its entirety and the Complaint and Charge dismissed. It is therefore unnecessary to consider the Administrative Law Judge's proposed remedy.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT TRI-STATE WHOLESALE BUILDING SUPPLIES, INC.

Certificate of Service

I certify that the foregoing has been served by email on Gary Larkin and Daniel Goode this 19th day of December, 2014.

Edward S. Dorsey